ATTORNEY FOR APPELLANT:

TIMOTHY W. OAKES
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

LEWIS RHYNEARSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0508-CR-458
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0011-PC-198941

September 13, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Lewis Rhynearson ("Rhynearson") pleaded guilty in Marion Superior Court to twelve felonies, including four Class B felonies, one Class C felony and seven Class D felonies. Rhynearson was ordered to serve an aggregate executed sentence of forty years. Rhynearson appeals and raises the following issues, which we restate as:

> I. Whether the trial court abused its discretion when it considered Rhynearson's position of trust with the victims as an aggravating circumstance and failed to consider his guilty plea as a mitigating circumstance; and
>
> II. Whether Rhynearson's aggregate forty-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

Concluding the trial court did not err in considering the aggregating and mitigating circumstances and that Rhynearson's sentence is appropriate, we affirm.

Facts and Procedural History

Between December 1998 and April 1999, Rhynearson engaged in several sexual acts with his stepdaughter, F.C., including fondling her, having her perform fellatio on him, photographing them nude and performing sexual acts, and having intercourse with her. F.C. was about fourteen or fifteen years old when the sexual abuse began. Between January 2000 and March 2000, Rhynearson engaged in sexual intercourse with fourteen-year-old A.R., his biological daughter.

On December 28, 2000, the State charged Rhynearson with twenty-one felony counts based on the sexual abuse of his stepdaughter and biological daughter. Appellant's App. pp. 28-34. Rhynearson pleaded guilty to twelve counts: four Class B felony offenses, specifically rape, criminal deviate conduct, and two counts of incest; Class C felony sexual misconduct with a minor; and seven Class D felonies, specifically

dissemination of matter harmful to minors, three counts of child seduction, and three counts of child exploitation. Appellant's App. p. 60. At Rhynearson's guilty plea hearing, the trial court informed him that he could be sentenced to a maximum of 109 years. Tr. p. 14.

The trial court conducted a sentencing hearing on September 28, 2001. The trial court found the following aggravating circumstances: that Rhynearson was in a position of trust with the victims, that the abuse occurred over a length of time and multiple times, and that there were two victims. Tr. p. 51. As a mitigating factor, the trial court found that Rhynearson lacked a prior criminal history. Id. Finding that the aggravating circumstances outweighed the mitigating circumstance, the trial court ordered Rhynearson to serve twenty years for each of the four Class B felony counts, eight years for the Class C felony, and three years for each of the seven Class D felony counts. The trial court ordered Rhynearson's twenty-year sentences for Class B felony rape and Class B felony incest to run consecutively, and the remaining sentences to run concurrently, for an aggregate executed sentence of forty years. Rhynearson now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Aggravating and Mitigating Circumstances

On appeal, Rhynearson first contends that the trial court erred when it failed to assign mitigating weight to his guilty plea. Generally, "sentencing determinations are within the trial court's discretion." Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). When our court is faced with a challenge to an enhanced sentence, we must "determine

whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances." Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied.

In sentencing Rhynearson, the trial court made no mention of Rhynearson's guilty plea as a potential mitigating circumstance. Recently, our court observed, "a trial court generally should make some acknowledgement of a guilty plea when sentencing a defendant." Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005); see also Cotto, 829 N.E.2d at 526. Such mention of the guilty plea during sentencing is certainly the best practice for judges to follow. Often, "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." Francis v. State, 817 N.E.2d 235, 237 (Ind. 2004) (citing Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995)).

However, the extent to which a guilty plea is mitigating will vary from case to case. Id. at 238 n.3. If the guilty plea neither demonstrates a defendant's acceptance of responsibility for the crime nor extends a benefit to the State and/or the victim by avoiding a full-blown trial, our supreme court has held that the trial court does not abuse its discretion in declining to find the guilty plea to be a mitigating circumstance. Id. at 238 n.3 (citing Sensback v. State, 720 N.E.2d 1160, 1165, 1165 n.4 (Ind. 1999)).

Here, Rhynearson did not initially agree to plead guilty until after a jury was impaneled, and therefore, his guilty plea did not extend a substantial benefit to the State.

In addition, Rhynearson received a substantial benefit in exchange for his guilty plea as nine of the twenty-one felony charges against him were dismissed. This substantial benefit to Rhynearson would be adequate to permit the trial court to conclude that his plea did not constitute a substantial mitigating factor. See Sensback, 720 N.E.2d at 1165.

Moreover, Rhynearson later attempted to withdraw his guilty plea, claiming that he signed the plea agreement under duress. Appellant's App. p. 87. In fact, at the sentencing hearing when the trial court asked if there was any reason the judgment of conviction should not be entered, Rhynearson's counsel responded, "We would still raise that he should have been allowed to withdraw his plea agreement, Your Honor." Tr. p. 50. Rhynearson's repeated attempt to withdraw his guilty plea undermines his acceptance of responsibility for the crime, and therefore, the trial court appropriately did not assign mitigating weight to his guilty plea. See Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004).

Rhynearson further contends that the trial court erred in assigning aggravating weight to his "position of trust" with his biological daughter, as this relationship is inherent in the nature of the crime of incest.[1] Br. of Appellant at 10. Indiana Code section 35-46-1-3 (2004) provides, "[a] person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when the person knows that the other person is related to the person biologically as a parent, child,

[1] We note that in his reply brief, Rhynearson argues that all of the aggravators relied on by the trial court to enhance his sentence violated Blakely. Because he raises this issue for the first time in his reply brief, it is waived. Ind. Appellate Rule 46(C) (2006) ("No new issues shall be raised in the reply brief."); see also Felsher v. State, 755 N.E.2d 589, 593 (Ind. 2001). Waiver notwithstanding, were we to address this issue we would conclude that the trial court properly considered the aggravating circumstances based upon the facts to which Rhynearson admitted at his guilty plea hearing on July 9, 2001. McGinity v. State, 824 N.E.2d 784, 789 (Ind. Ct. App. 2005).

grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, commits incest." This statute requires a blood relationship, but it does not require a position of trust.

Moreover, being in a position of trust with the victim is a valid aggravating circumstance. Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005). There is no greater position of trust than that of a parent to his own child. Id. Such a position of trust, by itself, is a valid aggravator supporting imposition of the maximum sentence for a father who repeatedly had sexual intercourse with his daughter. Id. at 544. Therefore, the trial court properly considered Rhynearson's position of trust with his daughter as an aggravating circumstance.

II. Inappropriate Sentence

Finally, Rhynearson argues that his aggregate executed sentence of forty years is inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2006); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

As to the nature of the offense, we find it significant that there were two victims who were subjected to repeated sexual abuse. "Enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." Perry v. State, 845 N.E.2d 1093, 1097 (Ind. Ct. App. 2006), trans. denied (citing Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003)). Concerning the character of the offender, Rhynearson committed these offenses against

his own daughter and stepdaughter, with whom he was in a significant position of trust, over a lengthy period of time. These facts reveal Rhynearson's deplorable character. See Newsome v. State, 797 N.E.2d 293, 302 (Ind. Ct. App. 2003) (citing Groves v. State, 787 N.E.2d 401, 410 (Ind. Ct. App. 2003)).

In light of the nature of the offense and character of the offender, we conclude that Rhynearson's aggregate executed sentence of forty years is appropriate.[2]

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

[2] Rhynearson also argues that the maximum sentences he received for his Class C and D felony convictions are inappropriate. For the same reasons stated above, Rhynearson's maximum sentences on all of these counts are appropriate.